IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERIC AND BARBARA ROSENBERG LIVING TRUST,
Appellant/Cross-Respondent,
vs.

MACDONALD HIGHLANDS REALTY, LLC, a Nevada Limited Liability Company; MICHAEL DOIRON, an Individual; and FHP VENTURES, a Nevada Limited Partnership,
Respondents/Cross-Appellants.

FREDERIC AND BARBARA ROSENBERG LIVING TRUST,
Appellant,
vs.

SHAHIN SHANE MALEK,
Respondent.

Supreme Court No. 69399 and 70478 (Consolidated)

District Court Case No. A689113

RESPONDENT SHAHIN MALEK'S ANSWERING BRIEF

On Appeal from Judgment Granted by the Eighth Judicial District Court of the State of Nevada, in and for Clark County
Case No. A689113

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated this 14th day of December, 2016.

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I.

ROUTING STATEMENT

Respondent Shahin Malek ("***Malek***") objects to the Routing Statement in the Opening Brief of Appellant Frederic and Barbara Rosenberg Living Trust (the "***Rosenberg Trust***") as consisting of argument that should more properly be placed within the argument section of its brief. Further, this appeal is not presumptively retained by the Supreme Court because none of the categories set forth in NRAP 17(a) apply to this case. Malek disagrees with the Appellant that NRAP 17(a)(14) applies to this case, because an implied restrictive covenant against real property for air, light, and view is clearly not recognized in Nevada so the matters at issue in this case are not of statewide public importance. Rather, this appeal is presumptively assigned to the Court of Appeals because the Appellants are challenging the denial of their attempts to obtain injunctive relief against Malek, prohibiting construction of his home. (Appellant's Appendix Volume 1: JA_0001-21)

II.

ISSUES PRESENTED FOR REVIEW

The Rosenberg Trust has articulated the Issues Presented for Review as follows:

1. Whether the District Court erred in determining that Nevada does not recognize implied restrictive covenants.

2. Whether the District Court erred in granting summary judgment in favor of the MacDonald Parties and Malek when Rosenbergs established the existence of an implied restrictive covenant over the Golf Course, or at a minimum, set forth issues of fact that should have precluded summary judgment in this case.

3. Whether the District Court erred in finding that the Rosenbergs waived the MacDonald Parties' statutory and common law duty to disclose material facts.

4. Whether the District Court erred in granting summary judgment in favor of the MacDonald Parties on the issue of disclosure because issues of fact exist regarding the materiality of Malek's purchase of golf course property and the Rosenberg's ability to discover this information absent disclosure.

5. Whether the District Court abused its discretion in granted the MacDonald Parties attorneys fees when the Offer was unreasonable in time and amount.

6. Whether the District Court abused its discretion in granting Malek attorneys fees when the Rosenberg's claim was grounded in law, and therefore was not vexatious.

7. Whether the District Court abused its discretion in granting Malek attorneys fees without conducting a *Brunzell* analysis.

8. Whether the District Court abused its discretion in granting Malek attorneys fees even though Malek did not prevail on his counter-claim.

III.

STATEMENT OF FACTS

A. MALEK'S PURCHASE OF THE PROPERTY AT ISSUE

1. The Lot Located at 594 Lairmont

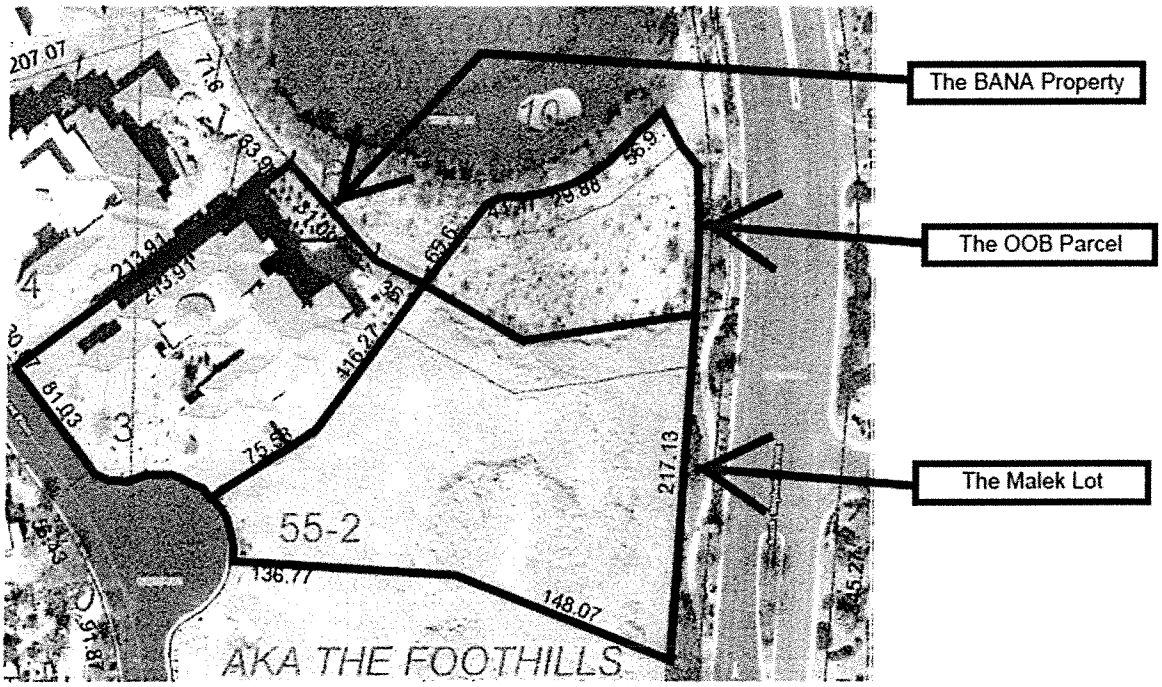
During 2006, Malek became a resident of the MacDonald Highlands area of Henderson, Nevada. (App. Vol. 4: JA_735) In the summer of 2012, he began looking for a place to construct a new home in MacDonald Highlands. (App. Vol. 4: JA_737-38) As part of his search, Malek and his agent viewed properties marketed by MacDonald Highlands Realty, LLC ("***MHR***"), including an empty lot located at 594 Lairmont Place, Henderson, Nevada (APN 178-27-218-002) (the "***Lot***"). (App. Vol. 4: JA_739-40)

2. The Out-of-Bounds "OOB" Parcel

At the time that Malek viewed Lot, the agent informed him that a certain section of raw land abutting the Lot was also available for sale (the "***OOB Parcel***"). (App. Vol. 4: JA_742) The OOB Parcel was a small section of non-manicured undeveloped desert pan located in an out-of-bounds area just outside of

the trees that formed the perimeter of the fairway near the 9th hole of the Dragon Ridge Golf Course (the "Golf Course").[7] (App. Vol. 3: JA_466 and Vol. 4:JA_756-57, JA_713, and JA_839)

The following illustration shows the location of the Lot, the OOB Parcel, and the BANA Property:



The OOB Parcel bordered the Lot to the north. (App. Vol. 3: JA_466) Malek's agent informed him that he could also purchase the OOB Parcel, increasing his lot size and allowing him to construct a home closer to the usable

[7] The Rosenberg Trust refers to the property at issue as "still in-play area of the 9th hole." *See* Opening Brief at 5. The Rosenberg Trust cites to 3JA_0551 in support of its assertion. However, 3JA_0551 (which is a portion of the Transcript for the deposition of Michael Doiron), does not state what the Rosenberg Trust claims that it does. Rather, Ms. Doiron testified that "it was the scrubbed area. It was the dirt area, not the green of the golf course . . ." *See* App. Vol. 3: JA_0551 (Transcript at 163:2-4)

portions of the Golf Course. (App. Vol. 4: JA_742) MHR and its agent, Michael Doiron ("***Doiron***"), confirmed that Malek could purchase the OOB Parcel with the Lot and build upon them. (App. Vol. 4: JA_658, JA_689-90, and JA_742-43)

3. The BANA Property Located at 590 Lairmont

To the Northwest of the Lot and to the west of the OOB Parcel, was another residential property identified with the common address 590 Lairmont Place, Henderson, Nevada (APN 178-27-218-003) (the "***BANA Property***"). (App. Vol. 1: JA_92) At the time that Malek was looking at the Lot and OOB Parcel, the BANA Property was owned by Bank of America, N.A. ("***BANA***"). Id.

4. Purchase of the Lot, Rezoning of the OOB Parcel, and Purchase of the OOB Parcel

On or about August 10, 2012, Malek closed on his purchase of the Lot. (App. Vol. 1: JA_92). However, before Malek could purchase and build on the OOB Parcel, it needed to be rezoned from public/semi-public to residential, and Malek needed to obtain approval of his design plans from the Design Approval Committee (the "***DRC***") of the MacDonald Highlands Master Association (the "***Association***"). (App. Vol. 4: JA_650-53, JA_658, JA_680-81, JA_705, and JA_744-45) Under the Covenants, Conditions, and Restrictions for the Association (the "***CCRs***"), the DRC had broad discretion to approve construction plans according to a set of design guidelines distributed to all property owners within MacDonald Highlands. (App. Vol. 4: JA_647-49 and Vol. 5: JA_908-09)

The plans were also subject to approval by the City of Henderson. (App. Vol. 5: JA_925)

The Association had previously sold or leased out-of-bounds sections of the Golf Course to the owners of lots adjacent to the Golf Course. (App. Vol. 4: JA_659-61, JA_687-88, and JA_719-21) Further, this process was not new because Red Rock Country Club and the Southern Highlands Golf Community had taken part in similar transactions. (App. Vol. 5: JA_961-74 and JA_975-85)

Accordingly, upon approval of his construction plans by the DRC, Malek paid the Association to retain B2 Development ("B2") to shepherd the OOB Parcel through the City of Henderson's re-zoning process. (App. Vol. 5: JA_913) The Association took every step necessary to comply with the City of Henderson's rezoning procedure. (App. Vol. 5: JA_911-23; Vol. 4: JA_862-66 and Vol. 5: JA_867-69; Vol. 5: JA_1016-26; and Vol. 5: JA_1028-38)

First, B2 mailed notices of a community meeting to discuss the zoning change of the OOB Parcel well in advance of the meeting. (App. Vol. 5: JA_913) A notice was sent to BANA, among other property owners in MacDonald Highlands. (App. Vol. 5: JA_955-56 and JA_1040-41)

Second, on October 22, 2012, the community meeting took place. (App. Vol. 5: JA_910) There were no objections to the rezoning of the OOB Parcel by

any other property owner, including BANA. Id. Similarly, no objections to the rezoning were submitted to the City of Henderson. (App. Vol. 5: JA_887)

Third, the City of Henderson conducted a planning commission meeting about the rezoning of the OOB Parcel. (App. Vol. 4: JA_862 and Vol. 5: JA_868)

Fourth, on December 4, 2012, the Henderson City Council passed a resolution approving the rezoning of the OOB Parcel from public/semi-public to residential use. (App. Vol. 4: JA_864 and Vol. 5: JA_867-68 and JA_1016-26)

Fifth, on December 18, 2012, the Henderson City Council conducted a public meeting and approved the zoning change. (App. Vol. 5: JA_868-69 and JA_1028-38) BANA did not appear or object. Id.

Sixth, on January 7, 2013, the City of Henderson recorded an ordinance with the Clark County Recorder's Office. (App. Vol. 5: JA_868 and JA_1028-38)

Finally, the City of Henderson created a new map reflecting the OOB Parcel's new residential zoning and made it available to the public at the front desk of city hall on January 24, 2013. (App. Vol. 5: JA_869-704) Although it would take several months before the new final map reflecting the zoning changes could be recorded because of the many signatures needed from various departments in the City of Henderson, by mid-February 2013, the new residential zoning classification for the OOB Parcel was reflected in the City of Henderson's interactive, Internet-based zoning map. (App. Vol. 5: JA_876 and 1043-49) The

online interactive tool was available to the public so users could see a zoning map for a specific property, as well as nearby pieces of property in a matter of only a few minutes. (App. Vol. 5: JA_874-84 and JA_1043-49) The final map was ultimately recorded on June 26, 2013. (App. Vol. 5: JA_874, 882, 885, 888 and JA_933-35) Malek closed on his purchase of the OOB Parcel the same day. (App. Vol. 7: JA_1379-86)

5. Staking the Lot and OOB Parcel for Construction

In the interest of commencing construction in a timely manner, in December 2012 (while the re-zoning was pending), Malek had hired surveyors to stake the Lot, as well as the OOB Parcel, to identify where he intended to build his new home (the "***Staking***"). (App. Vol. 4: JA_773) The Staking was clearly visible from a visual inspection of the Lot and OOB Parcel and the surrounding area, including the BANA Property. Id.

B. ROSENBERGS' PURCHASE OF THE BANA PROPERTY

1. Rosenbergs' Offer

Meanwhile, on or about February 2013, Appellant Rosenberg Trust, through one of its trustees, Barbara Rosenberg ("***Barbara***"), and its beneficiary, David Rosenberg ("***David***"), began to contact BANA's bank-owned property services vendor, REO Management, in order to purchase the BANA Property. (App. Vol. 4: JA_796-98 and Vol. 5: JA_1051-55 and JA_1057-59) Barbara sent

numerous emails to BANA in order to purchase the BANA Property for $1,750,000.00 cash. Id. On February 20, 2013, Rosenberg Trust sent a letter of intent to purchase the BANA Property; however, BANA declined the offer. (App. Vol. 4: JA_789-92 and Vol. 5: JA_1051-55) Rather, BANA listed the BANA Property for sale. (App. Vol. 4: JA_794-95)

2. Lack of Due Diligence

The Trustees of the Rosenberg Trust had invested in several properties, including their 8,000 square foot seven-bedroom primary resident in California, another home in Los Alamitos, California, two condominiums in Manhattan Beach, California, and another home in Hermosa Beach, California. (App. Vol. 4: JA_783-86) In fact, Barbara had more than 25 years of experience selling residential real estate and estimated that she sold more than 500 houses in her career. (App. Vol. 4: JA_782-83 and JA_802) David, who assisted in acquiring the BANA Property is a licensed attorney who has lived in the Green Valley area of Henderson, Nevada since 2009. (App. Vol. 4: JA_786-88)

Nonetheless, in spite of the vast experience with real estate of its principals, the Rosenberg Trust purchased the BANA Property practically sight unseen. Although it would have taken the Rosenberg Trust's principals a matter of a few minutes on-line, or a short visit to the front desk of the City of Henderson, Nevada to examine the zoning of MacDonald Highlands, Barbara and David did not do so.

(App. Vol. 4: JA_804, JA_812-13, JA_816-17, and JA_822-26) Similarly, neither Barbara nor David ever contacted the City of Henderson's planning department to obtain more information about MacDonald Highlands. (App. Vol. 5: JA_0887-88)

Further, Barbara conducted a walk-through inspection of the BANA Property prior to closing, but never bothered to look over at the Lot and OOB Parcel where should have clearly seen the Staking which marked the location where Malek intended to construct his home. (App. Vol. 4: JA_826)

3. Closing on Purchase of Rosenberg Property "as-is"

Prior to closing, Doiron provided the Rosenberg Trust with a series of disclosures and advised Barbara and David that they had an additional five days to review the documents before closing on their purchase of the BANA Property. (App. Vol. 4: JA_693-97 and Vol. 5: JA_1068-71 and JA_1073-84) Among other things, the disclosures informed the Rosenberg Trust that the BANA Property had diminished privacy due to being directly on the Golf Course, and advised the Rosenberg Trust, in bold type, to obtain more current zoning and master plan information from the City of Henderson. (App. Vol. 4: JA_817-20 and JA_821-22; and Vol. 5: JA_1064-66) The Rosenberg Trust was given the phone number and address for Henderson City Hall. Id. However, neither Barbara nor David did anything with this information, and on May 15, 2013, the Rosenberg Trust closed on its purchase of the BANA Property "as-is, where-is" for the all-cash purchase

price of $2,302,000.00. (App. Vol. 4: JA_800-06, JA_808-09; and Vol. 5: JA_1073-84)

C. ROSENBERG TRUST'S ATTEMPT TO BULLY AND CONTROL ITS NEIGHBORS

1. Confrontation

Approximately 1-2 months after closing on its purchase of the BANA Property, the Rosenberg Trust's principals learned that Malek had purchased the Lot and OOB Parcel. (App. Vol. 4: JA_832) David met Malek thereafter and expressed rage and disbelief at Malek and his plans to construct his home. (App. Vol. 4: JA_769-71) The Rosenberg Trust's objection to Malek's construction was that it would affect the light, view, and privacy of the BANA Lot. (App. Vol. 4: JA_835-38 and JA_841; and Vol. 5: JA_1086-94 and JA_1096-103) It certainly had nothing to do with the functionality of the Golf Course or the ability of the Rosenberg's to use or access the Golf Course. In fact, Barbara does not even play golf. (App. Vol. 4: JA_839)

Rather, David threatened litigation as an illegitimate form of neighborhood control with the expressed purpose of making it "very expensive" for Malek to build his home. (App. Vol. 4: JA_769-71) David then went to MHR's offices and began to scream at Doiron, accusing her of unspecified wrongs "over and over." (App. Vol. 4: JA_684-85) Doiron offered to meet with David to sit down and

discuss his issues further. (App. Vol. 4: JA_685-86) However, he declined the invitation. Id.

2. Underlying Lawsuit

On September 23, 2013, the Rosenberg Trust filed this matter against BANA, MHR, and other parties, including Malek. (App. Vol. 1: JA_1-21) Throughout the litigation in the case below, the Rosenberg Trust sought injunctive relief against Malek and a declaration that he could not build his home, even though his plans were approved by the DRC. Id. On September 30, 2013 and October 24, 2013, the Rosenberg Trust also recorded a notice of lis pendens (the "***Lis Pendens***") and amended notice of lis pendens (the "***Amended Lis Pendens***") against the Lot and OOB Parcel even though it asserted no title or possession claims against Malek. (Respondent's Appendix, Volume 1: RA_1-2, 3-6) Consequently, on January 9, 2014, the District Court expunged the Lis Pendens and Amended Lis Pendens. (Resp. App., Vol. 1: RA_7-8)

3. The Motions for Summary Judgment.

On April 16, 2015, Malek filed a Motion for Summary Judgment against the Rosenberg Trust and a Statement of Undisputed Facts (the "***Malek MSJ***"). (App. Vol. 1: JA_0198-228; and Vol. 4: JA_0630 through Vol. 6: JA_1119) On May 4, 2015, the Rosenberg Trust filed its Opposition to the Malek MSJ, along with a Countermotion for Summary Judgment, and a Response to

Malek's Statement of Undisputed Facts (the "***CounterMSJ***"). (App. Vol. 6: JA_1215-340 and Vol. 7: JA_1341-68; and Vol. 7: JA_1369-415) On May 5, 2015, Malek filed an Opposition to the CounterMSJ. (App. Vol. 7: JA_1416-85) On May 11, 2015, the Rosenberg Trust filed a Reply to Malek's Opposition to the CounterMSJ. (App. Vol. 7: JA_1486-96) On May 12, 2015, Malek filed a Reply to the Opposition to the Malek MSJ. (App. Vol. 7: JA_1517-38)

On June 10, 2015, the District Court conducted a hearing on the Malek MSJ and CounterMSJ. (App. Vol. 14: JA_2898-969) At the hearing, the District Court granted the Malek MSJ and denied the CounterMSJ, except with respect to Malek's counterclaim for slander of title (with respect to which genuine issues of material fact remained). Id. On August 13, 2015, the District Court entered an Order which granted summary judgment in favor of Malek on all claims asserted by the Rosenberg Trust, and all counterclaims asserted by Malek against the Rosenberg Trust (except for slander of title) (the "***MSJ Order***"). (App. Vol. 12: JA_2457-75) The MSJ Order also contained detailed findings of fact. Id.

4. The Motion for Attorneys Fees

On September 9, 2015, Malek filed a Motion for Attorneys Fees and Costs and Verified Memorandum of Costs (the "***Malek Fee Motion***"). (App. Vol. 13: JA_2684-762) On September 14, 2015, the Rosenberg Trust filed a Motion to Retax Malek's Costs (the "***Motion to Retax***"). (Resp. App., Vol. 1: RA_9-15 On

October 2, 2015, Malek filed an Opposition to the Motion to Retax. (Resp. App., Vol. 1: RA_16-21) On October 22, 2015, the District Court conducted a hearing on the Motion to Retax, but continued it to December 1, 2015 to allow the Rosenberg Trust to oppose the Malek Fee Motion. (App. Vol. 14: JA_2994-3047) On October 23, 2015, the Rosenberg Trust filed an Opposition to the Malek Fee Motion. (App. Vol. 13: JA_2763-73) On November 19, 2015, Malek filed a Reply to the Opposition to the Malek Fee Motion. (Resp. App., Vol. 1: RA_22-31)

On December 1, 2015, the District Court conducted a hearing on the Malek Fee Motion. (App. Vol. 14: JA_3048-60) On January 13, 2016, the District Court entered an Order granting the Malek Fee Motion, in part (the "***Malek Fee Order***"). (Resp. App., Vol. 1: RA_32-8)

On May 23, 2016, the Rosenberg Trust filed its Notice of Appeal with respect to the MSJ Order and Malek Fee Order.[8] (Resp. App., Vol. 1: RA_39-41).

[8] On December 9, 2015, the Rosenberg Trust also filed a Notice of Appeal with respect to another Order entered in the case, which is the subject of Appeal No. 69399, consolidated with this case.

IV.

SUMMARY OF THE ARGUMENT

1. The District Court properly granted summary judgment in favor of Malek because the Rosenberg Trust was seeking imposition of an implied easement or implied restrictive covenant for view, air, and light over Malek's property, which claim is not recognized in the State of Nevada.

2. The District Court did not abuse its discretion for granting to Malek a fraction of the attorneys fees and costs he incurred in this case because the Rosenberg Trust maintained the lawsuit even after the frivolity of its claim was obvious.

V.

LEGAL ARGUMENT

A. STANDARD OF REVIEW

The Nevada Supreme Court will review an appeal from an order granting a motion for summary judgment *de novo*. Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992); Sustainable Growth Initiative Committee v. Jumpers, LLC, 122 Nev. 53, 128 P.3d 452, 458 (2006). Summary judgment is appropriate under when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to

judgment as a matter of law. Wood v. Safeway, 121 P.3d 1026, 1031, 121 Nev. Adv. Op. 73 (Oct. 20, 2005); Jumpers, 122 Nev. 53, 128 P.3d at 458.

For the following reasons, this matter should be affirmed.

B. THE ROSENBERG TRUST MISCHARACTERIZED THE DISTRICT COURT'S RULING

In its Opening Brief, Rosenberg Trust argues that the District Court erred when it found that Nevada law does not recognize implied restrictive covenants. *See* Opening Brief at 16. At the same time, the Rosenberg Trust spends three entire pages of its Opening Brief giving a history of implied restrictive covenants in the State of Nevada. *See* Opening Brief at 13-16.

There is only one problem. The District Court never ruled that the State of Nevada does not recognize implied restrictive covenants. Rather, the District Court held:

> 1. Nevada law has squarely and repeatedly repudiated the notion that easements or restrictive covenants may arise by implication ***to protect views, privacy, or access to light.*** *Probasco v. City of Reno*, 85 Nev. 563, 565, 459 P.2d 772, 774 (1969); *Boyd v. McDonald*, 81 Nev. 642, 650-51, 408 P.2d 717, 722 (1965).

(App. Vol. 12: JA_2465)(emphasis added). The District Court was 100% correct. Nearly fifty years ago, the Nevada Supreme Court emphatically stated in Probasco v. City of Reno, that Nevada has "expressly repudiated the doctrine of implied negative easement of light, air and view for the purpose of a private suit by one

landowner against a neighbor." 85 Nev. 563, 565, 459 P.2d 772, 774 (1969) (*citing* Boyd v. McDonald, 81 Nev. 642, 408 P.2d 717 (1965)). Nothing has changed since then. Nevada still does not recognize such a right. Therefore, the District Court did not err when it refused to grant an easement or implied restrictive covenant in favor of the Rosenberg Trust for light, air and view over Malek's property.[9]

C. THE DISTRICT COURT CORRECTLY DENIED THE ROSENBERG TRUST AN EASEMENT OR RESTRICTIVE COVENANT FOR VIEW, PRIVACY, AIR, AND LIGHT.

As stated above, the State of Nevada has never recognized the existence of any implied negative easements of view, privacy, light, and/or air. However, in its Opening Brief, the Rosenberg Trust tries to alter the analysis, claiming that the issue is really whether the OOB Parcel must remain a part of the Golf Course *ad inifinitum*. *See* Opening Brief at 17-27. However, that was not the issue before the District Court and not borne out by the undisputed facts presented to the District Court.

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[9] So there is no confusion, the District Court also determined that Nevada does not recognize a *cause of action* for implied restrictive covenant (in general) and refused to create one. (App. Vol. 12: JA_2468 (Order at Conclusion of Law No. 6)) This was correct, because the proper *cause of action* to impress an implied restrictive covenant upon the land of another private party is an action to *quiet title.* However, the Rosenberg Trust never asserted such a cause of action. (App. Vol. 1:89-109) Consequently, the District Court, quite rightly, expunged the Rosenberg Trust's Lis Pendens and Amended Lis Pendens. (Resp. App., Vol. 1: RA_7-8 In any event, even if the Rosenberg Trust had pled a cause of action for quiet title, it

Rather, the District Court properly found:

> 28. During the course of the litigation, the Trust's discovery responses indicated its only concern was the loss of view, light, and privacy that might accompany Malek's construction on 594 Lairmont (including the Golf Parcel). Barbara Rosenberg's deposition testimony and the Trust's responses to interrogatories propounded by Defendants Bank of America, MacDonald Highlands Realty, LLC, and Michael Doiron repeatedly identified potential loss of view, light, and privacy as the damages arising if the [sic] Malek built on 594 Lairmont. Rosenberg Dep. at 184-22-187:20, 195:11-12; Mot Exhs. 15, 16.
>
> 29. Specifically, the Trust's interrogatory responses stated that 590 Lairmont would be affected by Malek's construction on the Golf Parcel [i.e., the OOB Parcel], with effects upon "the view of the golf course and mountains, privacy, and light entering [the property]." Mot. Exhs. 15, 16.

(App. Vol. 12: JA_2464-65).

This is confirmed by the undisputed facts presented to the District Court below:

1) the Rosenberg Trust complained that the ***loss of privacy*** caused by Malek's construction made the BANA Property worthless to it. *See* Rosenberg Deposition Transcript at 184:22-187:20 (App. Vol. 4: JA_835-38)

2) in multiple discovery responses, the Rosenberg Trust identified only ***loss of view, privacy, and access to air and light*** as the sole harms caused by Malek's proposed construction. *See* Interrogatory Answers at 3:13-27, 4:24-5:10, 5:17-25

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still could not have prevailed on its claim in this case: an easement or implied restrictive covenant over Malek's property ***to protect the Rosenberg Trust's view***.

(App. Vol. 5: JA_1086-94) and Interrogatory Answers at 3:9-21, 6:12-23 (App. Vol. 5: JA_1096-103); and Rosenberg Deposition Transcript at 101:12-102:2, 192:10-23, 198:2-25, 209:12-210:25 (App. Vol. 4: JA_810-11, JA_840, JA_842, and JA_847-48)

3) construction on the OOB Parcel would only affect the Rosenberg Trust's secondary, or "borrowed" ***view*** across the OOB Parcel, if anything. *See* Rosenberg Deposition Transcript at 198:2-199:9 (App. Vol. 4: JA_842-43), Bykowski Deposition Transcript, Part II, at 125:4-129:21 (App. Vol. 5: JA_928-32), and MacDonald Deposition Transcript at 60:18-21 and 100:10-18 (App. Vol. 4: JA_713 and JA_718)

4) when asked what the Rosenberg Trust was losing with Malek buying the OOB Parcel, Barbara Rosenberg simply testified: "what we are losing possibly is privacy . . . [w]hat we wanted was this peaceful, unobstructed view . . ." *See* Rosenberg Deposition Transcript at 195:11-12 (App. Vol. 4:JA_841)

5) Barbara Rosenberg does not even play golf. *See* Rosenberg Deposition Transcript at 189:23-190:21 (App. Vol. 2: JA_281 and App. Vol. 4: JA_839)

Consequently, the District Court properly ruled: (1) "the evidence before the Court shows only that the Trust has based its claim for an implied easement on its fear of potentially losing the view, privacy, or access to light 590 Lairmont presently enjoys," (Conclusion of Law No. 4) and (2) "[t]he Trust has not advanced

any evidence that its claim for an implied restrictive covenant seeks to preserve or protect anything other than its view, light, or privacy. Any of these three concerns are insufficient bases for the Court to imply an easement or restrictive covenant exists over the Golf Parcel. As the Trust has not produced any evidence showing an alternative, cognizable basis for the Court to impose an implied restrictive covenant on the Golf Parcel, the Court will not do so." (Conclusion of Law No. 8) (App. Vol. 12: JA_2467-69)

This case was only ever about the Rosenberg Trust's view and any argument on the part of the Rosenberg Trust that it was concerned about the nature of the Golf Course is disingenuous. This case was never about the Rosenberg Trust's use of, or access to, the Golf Course, nor was it about the ability of the Golf Course to continue to function without the use of a small sliver of dry desert out-of-bounds land, an no evidence was ever introduced to support such a claim. Further, the Rosenberg Trust did not furnish the District Court with any evidence that the Golf Course ceased to fully function as a golf course as result of the sale of the OOB Parcel to Malek, or that the principals of the Rosenberg Trust were prevented from using the Golf Course (even though Barbara Rosenberg admitted that she does not even play the game). (App. Vol. 2: JA_281 and App. Vol. 4: JA_839)

In fact, the Rosenberg Trust only concocted a theory regarding the immutable sanctity of golf course land during briefing on Malek's MSJ. (App.

Vol. 6: JA_1215-368) It was not a concern when the Rosenberg Trust purchased the BANA Property, nor was it a concern to the Rosenberg Trust during discovery when its principals answered interrogatories and deposition questions under oath.[10]

Consequently, the arguments by the Rosenberg Trust based upon non-Nevada cases involving communities with "common-schemes" which included a golf course, are unavailing. Moreover, the cases cited by the Rosenberg Trust are materially distinguishable. In Ute Park Summer Homes Association v. Maxwell Land Grant Company, the defendant sought to ***eliminate a golf course altogether***. 427 P.2d 249, 251-52 (N.M. 1967)(golf course on plat map but never constructed; subsequent owner tried to sell entire golf course without any restriction on use).

The same is true for ***every other case cited by the Rosenberg Trust***. *See* Skyline Woods Homeowners Association, Inc. v. Broekemeier, 758 N.W.2d 376, 381 (Neb. 2008) (golf course in operation since 1967 fell into disrepair and subsequent owner had no intention of reopening it); Heatherwood Holdings, LLC v. HGC, Inc., 746 F.3d 1206, 1211-13 (11th Cir. 2014) (golf club completed in 1986 but closed in 2008; subsequent owner filed Chapter 11 bankruptcy and tried

[10] This is further made obvious by the fact that the Rosenberg Trust's expert witness, Brunson-Jiu, LLC, calculated the Rosenberg Trust's alleged damages as a result of their loss of ***view*** from the BANA Property. *See* Rebuttal Report by R. Scott Dugan (App. Vol. 2: JA_453 through Vol. 3:JA_0530), paying particular attention to the table at JA_0469-71, which is an analysis of Brunson-Jiu's premises, assumptions, and conclusions (left-column of the table) and Dugan's responses (right-column). All of these considerations ***solely*** involve the Rosenberg Trust's ***view*** from the BANA Property which they purchased.

to sell property free and clear of all liens and restrictions); Mountain High Homeowners Ass'n v. J. J. Ward Co., 209 P.3d 347, 349-50 (Or. Ct. App. 2009) (9-hole golf course built in 1984 and expanded to 18-holes in 1991, closed in 2003 and defendant refused to maintain it); Shalimar Ass'n v. D.O.C. Enterprises, Ltd., 688 P.2d 682, 683-85 (Ariz. Ct. App. 1984) (golf course maintained only until it was sold to the appellants who attempted to redevelop it for other purposes); Riverview Community Group v. Spencer & Livingston, 295 P.3d 258, 260-61 (Wash. Ct. App. 2013) (golf course opened in 1994 but closed in 2009 and equipment sold; neighbors sued owner to force restoration of golf course).[11]

Contrariwise, in this case, the owners of the Golf Course are not attempting to redevelop the Golf Course or eliminate its use as a recreational feature in the community. The Golf Course is still open for business and continues to act as a feature in the neighborhood as the Rosenberg Trust argues it was led to believe would be the case. Thus, these cases, which are factually dissimilar to the present case with respect to the most critical factor, cannot help the Rosenberg Trust morph this case into something about which it is not.

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[11] It is interesting to note, further, that the golf course in Mountain High was originally a 9-hole course which later expanded into an 18-hole course. Nonetheless, in finding an equitable servitude, the Court only required the defendant to restore and operate the 9-hole course for 15 years. Thus, the ***exact specific dimensions*** of the course were not important; only that a course be restored and open for business. In our case, the Golf Course has always been open for business, and the removal of a sliver of out of bounds property is irrelevant to the continued operation of the Golf Course.

D. UNDER THE STANDARD IN *BOYD*, THE ROSENBERG TRUST WAS NOT JUSTIFIED IN EXPECTING THAT THE OOB PARCEL WOULD REMAIN PART OF THE GOLF COURSE.

Even if the Nevada Supreme Court was to disregard the undisputed evidence presented to the District Court which confirmed that the only concern of the principals of the Rosenberg Trust was their view from the BANA Property, the Rosenberg Trust cannot prevail.

In its haste to bully and control its neighbor, the Rosenberg Trust glazes over the standards for implied restrictive covenants (for things other than view, light, and air) as set forth in Boyd v. McDonald, 81 Nev. 642, 408 P.2d 717 (1967). In its Opening Brief, the Rosenberg Trust admits that the inquiry is "what a ***reasonable*** grantee would be justified in expecting as a part of the bargain when he purchases land under the particular circumstances." *See* Opening Brief at 16 (*quoting* Boyd at 648, 408 P.2d at 721)(emphasis added).

In this case, the undisputed evidence before the District Court demonstrated that the Rosenberg Trust was not justified in what it now claims was its expectation that the sliver of dry out-of-bounds property constituting the OOB Parcel (that the Trust principals never even looked at before purchasing the BANA Property) would always remain restricted to golf course purposes only. Certainly, a reasonable buyer under the particular circumstances would have no such expectation.

1. BANA Had no Beneficial Interest in an Easement or a Restrictive Covenant to Give to The Rosenberg Trust.

Courts recognize that it is fundamental that when a buyer purchases real property it acquires title subject to the rights and obligations incumbent upon it prior to its purchase. The successor-in-interest retains the same rights as the original owner, with no change in substance. Home Builders Ass'n of Central Ariz. v. City of Maricopa, 158 P.3d 869, 874 (Ariz. Ct. App. 2007).

In this case, the undisputed evidence confirmed that the BANA Property was purchased by the Rosenberg Trust from BANA. (App. Vol. 1: JA_92-96 and Vol. 4: JA_789-90) However, the Rosenberg Trust furnished no evidence that BANA had any title to the OOB Parcel, or that BANA was the beneficiary of any express easement or restrictive covenant which controlled the use of the OOB Parcel.

Rather, the evidence showed that prior to selling the BANA Property to the Rosenberg Trust, BANA was on notice that B2 was processing a zoning change for the OOB Parcel, BANA never objected to the zoning change at the October 22, 2012 community meeting, BANA never objecting to the zoning change at the December 4, 2012 or December 18, 2012 City Council Meetings for the City of Henderson, BANA was on notice of the recorded January 7, 2013 ordinance, and BANA was on notice of the new zoning map made available to the public on January 24, 2013 (and available on-line in mid-February 2013). (App. Vol. 5: JA_913, JA_955-56, and JA_1040-41; Vol. 5: JA_910; Vol. 5: JA_887; Vol. 4:

JA_862 and Vol. 5: JA_868; Vol. 4: JA_864 and Vol. 5: JA_867-68 and JA_1016-26; Vol. 5: JA_868-69 and JA_1028-38; Vol. 5: JA_868 and JA_1028-38; Vol. 5: JA_869-704; Vol. 5: JA_876 and 1043-49; Vol. 5: JA_874-84 and JA_1043-49; Vol. 5: JA_874, 882, 885, 888 and JA_933-35)

Further, BANA was on public notice that (1) the Association had sold or leased out-of-bounds sections of the Golf Course to the owners of lots adjacent to the Golf Course, and (2) the Red Rock Country Club and Southern Highlands Golf Community had taken part in similar transactions. (App. Vol. 4: JA_659-61, JA_687-88, and JA_719-21; and Vol. 5: JA_961-74 and JA_975-85)

When BANA sold the BANA Property to the Rosenberg Trust, it was subject to the legal effect of these public events. Under these undisputed material facts, a reasonable grantee would not be justified in expecting that the OOB Parcel would remain for use solely as a golf course out-of-bounds fringe area until the end of time.[12]

2. The Rosenberg Trust Was On Notice That Malek Would Be Constructing His Home On The Lot And OOB Parcel Prior To Purchasing The BANA Property.

[12] The Rosenberg Trust also points several times to the "premium" it claims that it paid to purchase its "dream home" (the BANA Property). *See e.g.* Opening Brief at 10. However, whether the Rosenberg Trust paid what it terms a "premium" for its "dream home" or not, is irrelevant because the standard in Boyd regarding the *reasonable* expectations of a buyer is an *objective* one.

Likewise, when the Rosenberg Trust purchased the BANA Property it was on public notice of the new zoning map which disclosed the rezoning of the OOB Parcel to residential use. (App. Vol. 5: JA_869-704) The Rosenberg Trust was also on public notice that (1) the Association had sold or leased out-of-bounds sections of the Golf Course to the owners of lots adjacent to the Golf Course, and (2) the Red Rock Country Club and Southern Highlands Golf Community had taken part in similar transactions. (App. Vol. 4: JA_659-61, JA_687-88, and JA_719-21; and Vol. 5: JA_961-74 and JA_975-85)

Moreover, the Rosenberg Trust was on inquiry notice of the Staking on the Lot and OOB Parcel which showed where Malek wanted to building his home. (App. Vol. 4: JA_773) Therefore, the Rosenberg Trust cannot complain that when it purchased the BANA Property, it did not receive any expected easement or restrictive covenant over the OOB Parcel to prohibit Malek's construction and to protect the Rosenberg Trust's panoramic and picturesque view of Stephanie Street and the Golf Course parking lot. (App. Vol. 4: JA_718 and JA_849)

3. The Rosenberg Trust Waived Any Claim To A Restrictive Covenant.

Waiver is the intentional relinquishment of a known right. Mahban v. MGM Grand Hotels, Inc., 100 Nev. 593, 596, 691 P.2d 421, 423 (1984). In this case, the District Court also properly ruled that the Rosenberg Trust waived any

claim it might have to assert an easement or implied restrictive covenant over the OOB Parcel, preventing Malek from also building a home.

Specifically, the District Court ruled:

> 5. Here, a seasoned real estate professional appears to have disregarded all warnings and notices before paying more than two million dollars for the "Rosenbergs' "dream" home. There similarly is no evidence the Trust's attorney beneficiary did any research before the Trust purchased the house in which he now resides. There is, however, undisputed evidence of the Trust and its trustee's substantial experience buying and selling high-end, residential real estate. The that end, the Trust's failure to use its acquired skill and knowledge in these areas effectively waived, under the circumstances, any claim it could have for the Court to exercise its jurisdiction to impose a restrictive covenant over Malek's property.

(App. Vol. 12: JA_2467-68)

The undisputed evidence supported the District Court's conclusion. First, as explained above, the Rosenberg Trust accepted title to the BANA Property subject to the legal effect of the public events cited above. Second, as the District Court found, the Rosenberg Trust was a sophisticated buyer. In fact, Barbara Rosenberg had more than 25 years experience as a residential real estate broker selling more than 500 homes in her career. (App. Vol. 4: JA_782-83, 802)

Notwithstanding those facts, Barbara Rosenberg conducted no research into the BANA Property's zoning or the use of the surrounding land, prior to purchasing the BANA Property. (App. Vol. 4: JA_804, JA_810-13, JA_816-17, JA_822, JA_822-26; and Vol. 5: JA_887-88) Barbara Rosenberg also waived the

Rosenberg Trust's right to a general inspection of the BANA Property. (App Vol. 4: JA_804 and JA_825-26; and Vol. 5: JA_1061-62)

Further, Barbara Rosenberg did not even look at the Lot or the OOB Parcel prior to purchasing the BANA Property. (App. Vol. 4: JA_826) If she had, she would have seen the Staking which marked the location where Malek intended to construct his home and which had been there since December 2012. (App. Vol. 4: JA_773-74) This, even though she knew that construction would take place on vacant lots surrounding the BANA Property. (App. Vol. 4: JA_792-93; and Vol. 5: JA_1050-55)

Moreover, Barbara Rosenberg signed disclosures provided to her in relation to the Rosenberg Trust's purchase of the BANA Property which advised the Rosenberg Trust that it should seek the most current zoning information from the City of Henderson. (App. Vol. 4: JA_821-22; and Vol. 5: JA_1066) Finally, the Rosenberg Trust agreed to purchase the BANA Property "as-is, where-is." (App. Vol. 4: JA_800-04, JA_808-09; and Vol. 5: JA_1073-84)

Accordingly, the District Court found, and the undisputed evidence confirmed, that the Rosenberg Trust waived any right to claim an implied restrictive covenant over the OOB Parcel when such a sophisticated buyer closed on its purchase of the BANA Property with little or no due diligence. The District Court was correct. The Rosenberg Trust cannot unilaterally impose upon Malek an

implied restrictive covenant preventing his construction on or over the OOB Parcel, especially where the Rosenberg Trust would have been aware of Malek's construction rights relative to the Lot and the OOB Parcel before purchasing the BANA Property, had its principals cared to look. The District Court should be affirmed.

E. THE DISTRICT COURT CORRECTLY GRANTED MALEK'S ATTORNEYS FEES AND COSTS

1. Standard of Review.

The Nevada Supreme Court reviews a district court's decision regarding attorney fees for an abuse of discretion. An "abuse of discretion" means something more than a belief that the reviewing court would have acted differently if placed in the circumstances confronting the district judge. The district judge's decision must strike the reviewing court as fundamentally wrong for an abuse of discretion to occur. *See* Anderson v. UPS, 915 F.2d 313, 315 (7th Cir. 1990).

2. The Rosenberg Trust's Claims Were Not Brought or Maintained on Reasonable Grounds Because They Were Not Grounded in Law.

According to N.R.S. § 18.010(2)(b):

> 2. In addition to the cases where an allowance is authorized by specific statute, ***the court may make an allowance of attorney's fees to a prevailing party***:
>
> . . .

> (b) Without regard to the recovery sought, ***when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party***. The court shall ***liberally construe*** the provisions of this paragraph ***in favor of awarding attorney's fees in all appropriate situations***. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

N.R.S. § 18.010(2)(b)(emphasis added).

In this case, Malek prevailed on all of the Rosenberg Trust's claims and all of Malek's counterclaims, except for slander of title. Under the plain language of N.R.S. § 18.010(2), the District Court found that the Rosenberg Trust had ***maintained*** its case ***without reasonable ground*** even after the briefing on the summary judgment motions had made it abundantly clear that Nevada law did not recognize the easement or implied restrictive covenant which the Rosenberg Trust sought to protect its view from the BANA Property. (App. Vol. 14: JA_2812)

Nevada Revised Statutes § 18.010(2)(b) makes it clear that a district court must "liberally construe" its provisions in favor of awarding attorneys' fees in all appropriate situations. Moreover, a claim is groundless when it is not supported by any credible evidence at trial. Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 995, 860 P.2d 720, 724 (1993). The district court's analysis of whether a party's claims were

reasonable depends on the circumstances of the case, and must be conducted in that context. Semenza v. Caughlin Crafted Homes, 111 Nev. 1089, 1095, 902 P.2d 684, 688 (1995), *citing* Bergmann v. Boyce, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993). Where proper research would reveal that a claim is barred by existing law, it is brought or maintained without any reasonable ground. Huettig & Schromm, Inc. v. Landscape Contractors Council, 582 F. Supp. 1519, 1522 (N.D. Cal. 1984).

In this case, the District Court properly exercised its discretion when it determined that the Rosenberg Trust "lacked the reasonable grounds to maintain this litigation . . ." and based on Malek's MSJ, it was "unreasonable for the Trust to maintain this litigation against [Malek] from [the date Malek filed his MSJ] onward." (App. Vol. 13: JA_2812)

Nonetheless, the Rosenberg Trust argues that it cannot be assessed with Malek's attorneys' fees because if this action was not frivolous *when initiated*, the fact that it becomes frivolous later cannot support an award of fees, quoting Duff v. Foster, 110 Nev. 1306, 1309, 885 P.2d 589, 591 (1994). *See* Opening Brief at 40. However, Duff is fundamentally different than the present case. In Duff, the Appellant filed a petition for custody of his children based upon a belief that they had been sexually molested by the Appellant's ex-wife and her husband. A report containing some evidence which identified a different perpetrator was disclosed at

trial, two years after the case was initiated. The Appellant did not drop his petition and lost at trial.

The fundamental difference to this case, is that, in Duff, there was a ***factual*** dispute regarding the identity of the perpetrator, and the Appellant did have some evidence at the time he filed his petition which would support his allegations but he lost at trial. However, more compelling counter-evidence was furnished to him at trial.

In contrast, in the present case, there was no factual dispute that was clarified or weakened later. It was a legal question: does Nevada recognize an easement or implied restrictive covenant for view, air, or light? The answer is and was a resounding "no." This was just as true at the beginning of the case as at the time that the Malek MSJ was heard. However, the District Court threw the Rosenberg Trust a bone by only assessing it with Malek's attorneys' fees which were incurred at and after the time that the Malek MSJ was filed.

In fact, the Rosenberg Trust should thank the District Court. The Rosenberg Trust's misguided escapades in this case actually cost Malek a lot more than the District Court awarded to Malek. Malek suffered attorneys fees to the tune of more than $122,033.93. (App. Vol. 13: JA_2695-98). Instead, the Rosenberg Trust was given a veritable bargain by being assessed with only about 13% of that amount. The District Court certainly did not abuse its discretion by awarding

attorneys fees to Malek when there was evidence of both the frivolity of the Rosenberg Trust's claims and proof that Malek incurred a much higher amount of attorneys' fees.

3. The District Court did Consider *Brunzell.*

In Appellant's Opening Brief, the Rosenberg Trust complains that the District Court failed to conduct a *Brunzell* analysis. *See* Opening Brief at 43.

However, the Nevada Supreme Court maintains that in determining the amount of fees to award, the [district] court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the *Brunzell* factors. Logan v. Abe, 350 P.3d 1139, 1143, 131 Nev. Adv. Op. 31 (June 4, 2015), *quoting* Haley v. Eighth Judicial Dist. Court, 273 P.3d 855, 860 (2012).

While it is preferable for a district court to expressly analyze each factor relating to an award of attorney fees, ***express findings on each factor are not necessary for a district court to properly exercise its discretion.*** Certified Fire Prot., Inc. v. Precision Constr., Inc., 283 P.3d 250, 258, 128 Nev. Adv. Op. 35 (Aug. 9, 2012) (emphasis added). Instead, the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence. *See* Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995).

Contrary to the suggestions of the Rosenberg Trust, the record below demonstrates that a *Brunzell* analysis was considered by the District Court. It was discussed and argued at length by the Rosenberg Trust in its Opposition to the Malek Fee Motion (App. Vol. 13: JA_2770 at 20-24) as well as by Malek in his Reply to the Opposition to the Malek Fee Motion. (App. Vol. 14: JA_2797-99). In fact, Malek's Reply demonstrated to the District Court that the Rosenberg Trust really did not dispute the first three *Brunzell* factors: (1) qualifications of counsel, (2) the rates or amounts charged, or (3) the quality of work performed in the case. (App. Vol. 14: JA_2797 at 20-21). The fourth factor, the result, speaks for itself. Moreover, the body of the Malek Fee Order stated that the Court has "reviewed the requested fees and Trust's Opposition to Malek's motion." (App. Vol. 13: JA_2812 at 11-12).

The Rosenberg Trust complains that Malek submitted invoices which were redacted for attorney-client privilege. *See* Opening Brief at 43. However, redactions to invoices "do not unduly inhibit [the Court's] ability to determine the reasonableness of those time entries." *See* Branch Banking and Trust Co. v. Jarrett, 2014 U.S. Dist. LEXIS 129531at *6 (D. Nev. Sept. 16, 2014). Therefore, the District Court did not abuse its discretion in awarding the attorneys fees to Malek set forth in the Malek Fee Order.

4. Malek was the Prevailing Party.

Finally, the Rosenberg Trust argues that the District Court should not have awarded Malek any attorneys fees because he did not prevail on his counterclaim for slander of title. *See* Opening Brief at 44.

In support of its argument, the Rosenberg Trust cites to 8th Circuit authority. However, according to the Nevada Supreme Court in MB America, Inc. v. Alaska Pacific Leasing Company, 367 P.3d 1286, 1292, 132 Nev. Adv. Op. 8 (2016), "[a] party ... prevail[s] under NRS 18.010 if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." Valley Elec. Ass'n v. Overfield, 121 Nev. 7, 10, 106 Palimar.3d 1198, 1200 (2005). To be a prevailing party, "***a party need not succeed on every issue***," LVMPD v. Blackjack Bonding, Inc., 343 P.3d 608, 615, 131 Nev. Adv. Op. 10 (Mar. 5, 2015) (emphasis added).

In this case, it is irrelevant whether Malek prevailed on his slander of title counterclaim.[13] Malek prevailed on all of the Rosenberg Trust's claims in the case in chief for (1) an easement, (2) declaratory judgment, (3) mandatory injunction, and (4) implied restrictive covenant. (App. Vol. 1: JA_0089-109 and JA_116-25;

[13] At the same, the District Court did not rule ***against*** Malek on his counterclaim for slander of title, it simply determined that there remained genuine issues of material fact prohibiting summary judgment at that stage of the proceedings. (App. Vol. 12: JA_2469-70) Malek subsequently dismissed the counterclaim without prejudice on May 17, 2016. (App. Vol. 13: JA_2841-45)

and App. Vol. 12: JA_2457-75). Malek, thus succeeded on the most significant issue in the litigation: whether the Rosenberg Trust could prevent Malek from building a home on his property because of a phantom easement or implied restrictive covenant to protect the Rosenberg Trust's view. Therefore, the District Court did not abuse its discretion by awarding Malek a mere fraction of his attorneys' fees.

VI.

CONCLUSION

For the foregoing reasons, the Nevada Supreme Court should affirm the District Court's decisions granting summary judgment in favor of Malek, and awarding him attorneys' fees.

Dated this 14th day of December, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14th day of December, 2016.

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CERTIFICATE OF SERVICE

I certify that on the 14th day of December, 2016, I served a copy of this **RESPONDENT SHAHIN MALIK'S RESPONDING BRIEF** via this Court's e-filing system on counsel of record for all parties to the action.

/s/ Jill M. Berghammer
Jill M. Berghammer, an employee
of SMITH & SHAPIRO, PLLC